No. 3679

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS CABIALE and ANDREW DONIZELLO,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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A.

STATEMENT OF THE CASE.

The plaintiffs in error, together with certain other persons, were charged with certain offenses in an information of eleven counts filed in the District Court of the Northern District of California. Plaintiffs in error were convicted upon certain counts, including the third count in which it was charged that they and the other defendants on July 22, 1920, at 1549 Stockton Street, in San Francisco, and within the jurisdiction of the Court,

> "did then and there unlawfully, willfully and knowingly in violation of Section 3, Title II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquor, to wit, claret wine, containing one-half of one per cent or more of alcohol by volume and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to-wit, the 'National Prohibition Act.' "

They were also convicted upon two other counts charging unlawful possession of intoxicating liquors, and the defendant Donizello was also convicted on the ninth and tenth counts, charging the unlawful furnishing of intoxicating liquors. The two plaintiffs in error so convicted were sentenced to be imprisoned in the county jail for six months.

The testimony shows generally that at the times in question the defendants Cabiale and Donizello conducted a restaurant at No. 1549 Stockton Street, San Francisco, known as the Gianduja Restaurant; that on July 22, 1920, a prohibition enforcement agent went to the restaurant and called for and was served with wine at one of the tables therein. On the following evening he made another similar purchase just before the place was raided by several enforcement agents and a considerable quantity of liquors seized and taken away. The testimony ap-

pearing in the transcript from pages 29 to 89, is too voluminous to be quoted or summarized here. It will be referred to in more detail in connection with the discussion of subdivision III of the brief of plaintiffs in error, wherein they challenge the sufficiency of the evidence.

The points relied on for reversal are five, which, stated briefly, are:

1. Insufficiency of Count III of the Information.

2. That the rule against splitting one transaction into several offenses was violated.

3. Insufficiency of the evidence to justify the verdict.

4. Error in receiving in evidence certain incriminatory tags; and

5. Error of the Court in giving a certain general charge in regard to the necessity for the enforcement of law, etc.

B.

ARGUMENT.

I. THE THIRD COUNT OF THE INFORMATION WAS SUFFICIENT.

It is pointed out that the judgment necessarily depends upon the validity of the third count of the Information in that the remaining counts on which convictions were had would not authorize the penalty of imprisonment, and since the third count,

if valid, would authorize the six months penalty imposed that alone need be considered.

An argument is adduced to show that had Congress made it unlawful to make any kind of a sale of intoxicating liquor, it would have been in excess of its power under the Eighteenth Amendment. But since it is conceded that the Volstead Act does not make all such sales of liquor invalid, the authorities so cited need not be considered. It is complained that it is not charged in the particular count that the liquor was sold for beverage purposes, and that, the averment being construed against the pleader, it must be presumed that it was not sold for beverage purposes. This argument gives no consideration to the provisions of Section 32 of the National Prohibition Act providing as follows:

> "Sec. 32. In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any *defensive negative averments,* but it shall be *sufficient* to *state* that the act complained of was then and there *prohibited* and *unlawful,* but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."

The information clearly measures up to the requirements of that section. It is distinctly averred therein that the sale of intoxicating liquor by the defendant at the time and place alleged "was then and there prohibited and unlawful." This averment would exclude the possible presumption that the liquor was sold for a proper or innocent purpose. An analogous statute providing for an almost identical rule of pleading is the Harrison Narcotic Act and effect has been given to such a statute in the following cases:

> *Fyke v. United States,* 254 Fed. 225, 228;
> *Melanson v. United States,* 256 Fed. 783, 785;
> *Rothman v. United States,* 270 Fed. 31;
> *Wallace v. United States,* 243 Fed. 300, 305.

The argument of plaintiffs in error is not directed to the insufficiency of the information as viewed in the light of this phase of the statute. But it was held in the Fyke case, supra, that there was no constitutional objection to that character of legislation, the court saying in that behalf:

> "We can not agree with the contention that Amend. Art. 6 of the Federal Constitution would prevent Congress from so enacting. An indictment, tho it failed to exclude defendant from the excepted classes, would sufficiently inform him of the nature of the accusation against him."

It is further said that the third count does not show but that defendant may have had a permit authorizing them to sell liquor; that the exception must

be negatived. But the exception has been negatived in the manner pointed out by the Act in that it is alleged that the sale was "prohibited and unlawful." The language of this Court in Young v. United States, 272 Fed. 967, in referring to a prosecution under the same Act, is pertinent in that behalf, to-wit:

> "The charge follows the language of the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation, and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense. This is sufficient. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819."

II. NEITHER VERDICT NOR JUDGMENT WAS AGAINST LAW.

In this subdivision of their brief, plaintiffs in error complain that their alleged offense was split up improperly into several distinct crimes and such acts stated in subsequent counts of the indictment and thus their rights were violated. The argument in this paragraph is meager and does not contain an analysis of the voluminous testimony to show that this complaint is well founded, nor is there citation of authority, either to illustrate the argument or substantiate the point. But since it is manifest that the third count is good, and sufficient alone to support the judgment or sentence imposed, the remain-

ing counts whether sufficient or insufficient, valid or invalid, may be disregarded.

Claasen v. United States, 142 U. S. 140, 35 L. Ed. 966;

Doe v. United States, 253, Fed. 903, 904.

III. THE EVIDENCE IS AMPLY SUFFICIENT TO JUSTIFY THE VERDICT OF GUILTY ON THE THIRD COUNT RENDERED AGAINST BOTH PLAINTIFFS IN ERROR.

It is complained that the evidence fails to show a sale of liquor by either of the defendants. It may be pointed out in the beginning that the defendants are not in a position to raise this question, in that they did not move for a directed verdict at the close of the testimony. It appears (Tr. p. 63) that counsel so moved at the end of the Government's case, but the motion having been denied, it was not thereafter renewed, although eleven witnesses thereafter testified for the defendants and four testified for the Government in rebuttal. In such a situation the defendants are not entitled to question the sufficiency of the evidence.

Clark v. U. S. 245 F. 112.

But if the question could be raised, the evidence is amply sufficient to show an unlawful sale of claret wine by the two plaintiffs in error and this on July 22 and also on July 23, 1920. Of course, it would be sufficient in support of the count to show a sale on either date. A sale is amply proven by the

testimony of witness Poultney. Besides testifying as indicated on pages 12 and 13 of the defendants' brief wherein he states that he went to the restaurant on July 22, spoke to Mr. Cabiale, told him he had come down for a little something to eat and to get something to drink, and he, Cabiale, said "that was all right he could have what he wanted." Cabiale thereupon ushered him to a seat and took his order and subsequently he was served by a waiter. He gave his order for eats and drinks to Cabiale, it further appears that Cabiale and Donizello were the owners and in charge of the restaurant, and that they were present. And same witness further states on page 32: "I say that Mr. Cabiale, one of these defendants, took my order. I am positive that I asked him for claret. I did not procure any liquor on the evening of the 22nd other than those four glasses of claret." And it appeared that on having given his order to Cabiale, whatever it was, he was subsequently served by a waiter and served with claret. A portion of the claret was taken away and shown to be fit for a beverage and containing forbidden percentages of alcohol. On the following evening, Friday, July 23d, the same witness went to the restaurant and ordered and was served first with claret and then with cocktails, and a portion of the claret and cocktails were taken by the officers in the subsequent raid. When Poultney was served with the liquors, as he states on July 23rd, the other officers of the Government raided the place.

At that time it seems the place was full of patrons—some witnesses estimate that one hundred and fifty people were there, and witness states that as soon as the officers came in, the waiters were running through the place saying, "Throw your wine away, the place is being raided; drink up your wine quick." Other waiters were seen carrying trays with what appeared to be wine and some of them on being accosted threw the liquor into the air. Witnesses identified Cabiale as being there on Friday evening, for example, the witness Kupser (Tr. p. 42). As for Donizello, he admitted in testifying in his own behalf that he was one of the owners of the restaurant; that he was in the restaurant on Friday evening, July 23rd, and that he was taking care of the cash register, as the witness Kupser states. Donizello further admitted on cross examination (Tr. p. 82), "As proprietor I have supervision of the service that is made to patrons. When I have time I go through the dining room and various places to see that patrons are served. I know what patrons receive by way of service in my restaurant. Whatever may be served is served with my knowledge and authority." This testimony should be considered with the testimony of the officers that they seized a large quantity of liquor from the several tables, which, upon being examined, showed a forbidden alcoholic content, and that the liquor was quite visible. It does not appear that there was any particular concealment. While Donizello admits his presence on Friday evening, he was also

shown to be there on the previous evening. As Poultney states (Tr. p. 34), "Aside from Coppola, Cabiale and Donizello I do not recognize any of the other five defendants. On Thursday night I saw Mr. Cabiale and the *gentleman behind him;* on Friday night I saw Mr. Cabiale and *the gentleman behind him* and the other gentleman, Mr. Coppola. The Bill of Exceptions does not formally identify the person described as "the gentleman behind him," but the jury were able to make this identification, and we have the statement of defendants' counsel in making a motion to the Court which fixes the identifications (Trans. p. 65), speaking of the witness Poultney, he states: "He testified that on Thursday night he saw Cabiale there, the gentleman who is seated right behind here, and *the gentleman behind him,* Mr. Donizello. The presumptions in this matter being with the Government and it being incumbent upon plaintiffs in error to show error, the record is insufficient to show that Poultney did not identify Donizello as being present on Thursday evening. Donizello admits that he was present on Friday evening, and it being shown to the jury that both defendants were owners and managers, were actually present in superintending the management and in conducting the business, one actually participating in taking an order for claret, and that both partners could clearly see that liquors were being used and dispensed by the waiters and were paid for at the cashier's desk to Donizello himself, the jury could not have done otherwise than find the defendants guilty.

As to the suggestion that the testimony shows that the case was within the rule of "agent provocateur," little need be said. The two lines of cases on this subject are well understood. It is undoubted that the line of cases of which *Woo Wai v. United States,* 223 Fed. 415, is a type, state a well settled rule. On the other hand, there is a line of cases of which

> *Rothman v. U. S.* 270 F. 31, 34;
> *Ramsey v. U. S.* 268 F. 825, 827;
> *Farley v. U. S.* 269 F. 721, 725.

are types, which equally support a doctrine more applicable to the case here, which is to the effect that where the agents of the Government have reason to believe that the law is being violated, especially where the defendants have formed a system of violating the law continuously, the officers have the right and duty of offering their patronage or requesting service or purchasing contraband liquors, as the case may be, to enable them to learn of the customary activities of the defendant and thus vindicate the law. Where a restaurant is conducting a flourishing business and selling liquors to all comers, as shown here, it is not at all a case of an unlawful entrapment for a Government agent to offer to patronize the business and thus secure evidence of the unlawful course of dealing. When Cabiale was asked to serve the claret, it appears that he was quite ready to serve it and had a supply on hand; but he could not have had such supply on hand unless he had previously

violated the law. The case is clearly of the type of the line of cases last above cited.

Little need be said as to counsel's theory that neither Cabiale nor Donizello are liable because their employees may have acted independently without their direction; that if the waiters sold wine contrary to their wishes they would not be liable. But the cases cited contain the concession that this authority may be express or implied. Manifestly in the case at bar if not expressed it was implied. The proprietors were actually present and even if blind could not have been ignorant of the fact that the wine was flowing freely and that revenues obtained from the sale thereof were coming into their own coffers, as was at times even indicated by the telltale tags. The evidence is amply sufficient to justify the verdict as against the two convicted defendants.

IV. THE TAGS FOUND IN THE CASH REGISTER OF PLAINTIFFS IN ERROR AT THE TIME OF THE RAID WERE PROPERLY RECEIVED IN EVIDENCE: THEY WERE NOT SUBJECT TO THE OBJECTION MADE BY THE DEFENDANTS.

As pointed out, the plaintiffs in error conducted a restaurant, and it was shown that they had a cash register near the front entrance, which was in charge of defendant Donizello. As previously arranged, Officer H. M. Kupser, who testified for the Government, was instructed to take his position near the cash register where the checks were paid, and he

there received and took charge of liquors which were taken from various portions of the restaurant (Trans. p. 39). He testified (Trans. p. 40):

> "I noticed as the various waiters would come up with their tags, they would have some sort of a tag and would produce it at the cashier's, where he registered it, and the amount was rung up according to what appeared on the tag. *The tags were then put in the cash register. I got some of those tags* on that evening. *These are some of those tags* which were in the bundle in the cash register."

The witness believes they were turned over to Mr. Shaen after they arrived back at the Agent's office. The record continues: Thereupon the United States Attorney offered *the said tags* in evidence; the two offered read as follows:

> "Gianduja Restaurant, Waiter No. 10, Check No. 24. Number of persons. 2 Cafe Royal $1. 1 Whiskey, 74 cents. 2 Wine, 50 cents, $2.25. War tax, 10 cents. $2.35."
>
> "Gianduja Restaurant, Waiter No. 10, Check No. 36. Short 25 cents. 2 Cafe Royal $1. 2 Whiskey $1.25. 1 wine 25. Total $2.50."

The record then proceeds:

> "To the introduction of this evidence counsel for the defendant then and there objected upon the grounds *that there was no means of identifying the said tags and that the same were not taken pursuant to a search-warrant.*"

The court overruled the objection and counsel excepted. It is not clear what was meant or would be implied from that portion of the objection that "there was no means of identifying the said tags." Manifestly there were means. It is not an objection that the proposed exhibit would be irrelevant, nor that there was not proper foundation laid for the offer. If such objection were meant, it is clear that when the witness states that he watched the course of business and saw the various waiters bring up tags, have them registered, the tags then put in the cash register, and that he "got some of *those tags,*" and that "*these are some of those tags* which were in the bundle in the cash register," when the Government offered "*the said* tags in evidence," the proper foundation was laid. It is easy to divine from the record, however, that counsel, as well as the Court, had principally in mind the latter portion of the objection, to wit, that they were not taken pursuant to a search warrant. This objection is not now pressed. Manifestly it could not be in view of the fact that it is stated by one of the Government Agents (Trans. p. 31) that a search warrant was procured for the purpose of searching the place. The record does not disclose either the contents or tenor of this search warrant nor the inventory or return that was made thereon. In the absence of such showing the presumptions would be with the Government. If, on the other hand, the incriminatory tags were made at the time of the raid and thus would not probably be described in the search warrant, plaintiffs would

be impaled upon the other horn of the dilemma in that the tags were an element of the crime, then and there being committed, and for which plaintiffs in error were arrested and the tags could have been and were properly seized as an incident to a lawful arrest.

Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652, 655;

1 *Bish. Crim. Proc.* Sec. 211.

The Court was also justified in refusing to entertain the objection that the tags were taken without a proper search warrant in that it was not proper to raise that collateral issue without notice in the middle of the trial.

Adams v. New York, 192 U. S. 585, 48 L. ed. 575.

If there be exceptions to this rule, they are cases where the facts are so far conceded as to dispense with the necessity of a trial of a collateral issue. In other words, a situation where a mere statement of the transaction shows that there was a violation of the Fourth Amendment. It is very clear that we have not such a case here.

V. THE LANGUAGE OF THE TRIAL JUDGE IN HIS GENERAL INSTRUCTIONS WAS NOT IMPROPER: IT WAS EMINENTLY APT AND A WISE OBSERVATION UNDER THE CIRCUMSTANCES.

Exception is now taken to a certain portion of the general charge of the trial judge given at the trial

which is quoted at page 5 of counsel's brief and appears beginning at page 89 of the transcript. But the criticisms are rather belated, for, at the time the general charge was given, no exception whatever was taken thereto. (Tr. pp. 89-98). Counsel was apparently so well satisfied that he did not except to or request any modification of the language now complained of. Later at the time he petitioned for a writ of error and filed assignments of error he had not even then conceived that the charge was in such respect subject to criticism, for it is not specified as one of the assignments of error. Subsequently, some change came over his views and he now strongly animadverts as against the particular language used. At the threshold we object to the consideration of the point for the reason that under the well settled rule no general exception to such a charge can be allowed in a Bill of Exceptions, nor can any exception to a portion of the charge be afterwards urged unless it is taken before the jury retires. It is also true that counsel are confined in their argument to their assignments of error filed with the petition for a writ of error. The latter may not be a hard and fast rule, for under the rule the Court may notice a *plain* error unassigned. But the necessity for an exception to the charge has a more fundamental basis in its support, for, if counsel at the time the charge was given had indicated by either exception or objection to the trial Judge that his language was deemed unfair or coercive, he could readily, if the point were well

taken, have altered the language and given the necessary cautionary admonitions to the jury before it retired. Failing such exception or objection, counsel is now conclusively presumed to have accepted the charge as being entirely fair and proper.

> *Allis v. United States,* 155 U. S. 117, 123; 39 L. Ed. 91, 93.

But if the matter were open to consideration, there is nothing in the charge that can be reasonably excepted to. It appears that the trial was the first of the term and the Court anticipating that the jury would be present for the term conceived it to be beneficial and to be its duty to state to the jurors some general observations regarding their duties as jurors, and did so in the first few paragraphs of the charge. The statements were avowedly general and not made with reference to the particular case. The jurors were told at the threshold that "the jury are the sole judges of the facts." They were admonished as to the duty of law enforcement and told that whether defendants in general awaiting trial were guilty or innocent was to be determined by each jury as the facts were presented. They were given to understand that the acquittal of a man who is guilty encourages violations of the law and that the assistance of the jury is required in law enforcement. There can be no criticism of these general observations, and that they were intended to be general and not to have

reference to the particular case appears patently from the charge. Having so discussed the situation, the Court expressly declares "Now that brings us to a consideration of the case itself." Thereupon the Court delivered a general charge which was not excepted to, and in which with great ability and signal care guarded all possible rights of the defendants; the jury were expressly told (p. 97) that "It is for the jury to determine whether any of these defendants are guilty," and also "The defendants in this case, as in any case upon trial in this Court for a criminal offense, are presumed to be innocent, and that assumption attaches at the commencement of the trial and remains with them until the jury have determined otherwise by their verdict if they so determine, "and the jury should not so determine unless they are satisfied of the guilt of the defendants beyond a reasonable doubt." That the charge was entirely proper and could not have violated any rights of the defendants is clear from the authorities.

Allis v. U. S., 155 U. S. 117, 123; 39 L. ed. 91, 93.

Simmons v. U. S. 142 U. S. 148; 35 L. ed. 968.

Keller v. U. S. 168 Fed. 697.

Savage v. U. S. 270 Fed. 14, 21;

Horning v. District of Columbia, 253 U. S. ——; 65 L. ed. ——;

Adv. Opinions, 64.

We confidently urge that the conviction of plain-

tiffs in error be upheld and that the judgment be affirmed.

Respectfully submitted,

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